

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHICO S.S. MOSS and KIM.ET LTDA,

Plaintiffs,

v.

Case No: 8:18-cv-587-T-23JSS

AMERICAN PRIVATE EQUITY, LLC and
FREDDY A. RUSSIAN,

Defendants.

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REPORT AND RECOMMENDATION

THIS MATTER is before the Court on Plaintiffs' Renewed Motion for Attorney's Fees and Costs ("Motion"). (Dkt. 276.) For the reasons set forth below, the Court recommends that the Motion be denied without prejudice.

BACKGROUND

On March 12, 2018, Plaintiffs filed their Complaint against Defendants for breach of contract and fraudulent inducement. (Dkt. 1 at 6-8.) On June 28, 2019, a jury returned a verdict in favor of Plaintiffs. (Dkt. 75.) On July 2, 2019, the Clerk of Court entered judgment in favor of Plaintiffs and against 1) Defendant American Private Equity, LLC, for \$112,000.00 in compensatory damages; 2) Defendants American Private Equity, LLC, and Freddy A. Russian, jointly and severally, for \$257,500.00 in compensatory damages; 3) Defendant American Private Equity, LLC, for \$300,000.00 in punitive damages; and 4) Defendant Freddy A. Russian for \$200,000.00 in punitive damages. (Dkts. 78-81.)

After the trial, Plaintiffs moved for an award of their attorney's fees and Defendants moved for a new trial. (Dkts. 84, 88.) On October 28, 2019, the Court denied Defendants' Motion for Judgment as a Matter of Law or for New Trial. (Dkt. 96.) On November 27, 2019, Defendants

filed their notice of appeal. (Dkt. 103.) While Defendants appeal was pending, the Court denied Plaintiffs' motion for attorney's fees without prejudice to re-filing to motion after disposition of the appeal. (Dkt. 111.)

On December 30, 2019, the Eleventh Circuit dismissed Defendants' appeal for lack of prosecution. (Dkt. 113.) After the dismissal of Defendants' appeal, Plaintiffs filed their Renewed Motion for Attorney's Fees. (Dkt. 276.) While the Motion remained pending, however, Defendants moved to reinstate their appeal. On February 4, 2020, the Eleventh Circuit granted Defendants' motion and reinstated their appeal, which remains pending. (Dkt. 284.)

APPLICABLE STANDARDS

As a general rule, the filing of a notice of appeal divests a district court of jurisdiction on any matter involved in the appeal. *In Green Leaf Nursery v. E.I. DuPont de Nemours & Co.*, 341 F.3d 1292, 1309 (11th Cir. 2003). However, the district court may retain jurisdiction to consider motions on matters that are collateral to the matters on appeal. *Mahone v. Ray*, 326 F.3d 1176, 1179 (11th Cir. 2003). Specifically, the district court may entertain a motion for attorneys' fees after a notice of appeal has been filed in the underlying case. *Briggs v. Briggs*, 260 F. App'x 164, 165 (11th Cir. 2007) (per curiam) (citing *Rothenberg v. Sec. Mgmt. Co.*, 677 F.2d 64, 65 (11th Cir. 1982)).

Alternatively, the Court has discretion to deny a motion for attorneys' fees without prejudice with leave to re-file after the appeal has concluded. *See* Fed. R. Civ. P. 54(d) advisory committee's note to 1993 amendment (providing that "[i]f an appeal on the merits of the case is taken, the court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal has been resolved"); *see also The Indigo Room, Inc. v. City of Fort Myers*, No. 2:12-

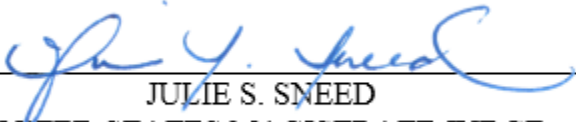
CV-39-FTM-38CM, 2014 WL 1174355, at *1 (M.D. Fla. Mar. 21, 2014)) (denying motion for attorney's fees without prejudice and with leave to re-file after entry of appellate court's mandate); *S.-Owners Ins. Co. v. Wall 2 Walls Const., LLC*, No. 8:12-CV-1922-T-33TBM, 2013 WL 6893254, at *1 (M.D. Fla. Dec. 31, 2013) (same).

ANALYSIS

Rather than resolving the Motion during the pendency of the appeal, the undersigned determines that the ends of justice would be better served by denying the motion without prejudice and with leave to re-file after the conclusion of the appeal. *See Bowers v. Universal City Dev. Partners, Ltd.*, No. 6:03-cv-985-ORL-18JGG, 2005 WL 1243745, at *2 (M.D. Fla. May 19, 2005) (stating that “[i]f the district court were to resolve the fee and cost issue while an appeal remains pending, it would be asked to repeat the procedure following the appeal”). Immediate resolution of the Motion is unwarranted given the procedural posture of the case.

Accordingly, it is **RECOMMENDED** that Plaintiffs' Renewed Motion for Attorney's Fees and Costs (Dkt. 276) be **DENIED** without prejudice and with leave to re-file within thirty days of the entry of a mandate by the Court of Appeals on Defendants' pending appeal.

IT IS SO REPORTED in Tampa, Florida, on March 10, 2020.



JULIE S. SPEED
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

A party has fourteen days from this date to file written objections to the Report and Recommendation's factual findings and legal conclusions. A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1.

Copies furnished to:
The Honorable Steven D. Merryday
Counsel of Record